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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEVIN ALBRIGHT,

Petitioner,

v.

ROGER OLIVER, individually and in his official capacity as police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation, and the CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A POLICE OFFICER WHO CONTRIBUTES TO THE FILING OF A CRIMINAL CHARGE WITHOUT PROBABLE CAUSE DEPRIVES THE ACCUSED OF A FUNDAMENTAL LIBERTY PROTECTED BY PRINCIPLES OF SUBSTANTIVE DUE PROCESS.

II. ASSUMING THE ACCUSED ENJOYS A FUNDAMENTAL RIGHT TO BE CHARGED ONLY UPON PROBABLE CAUSE, WHETHER THE NEGLIGENT OR GROSSLY NEGLIGENT FAILURE TO ASCERTAIN THE ABSENCE OF PROBABLE CAUSE VIOLATES PRINCIPLES OF SUBSTANTIVE DUE PROCESS.

III. ASSUMING PETITIONER HAS STATED A VALID SUBSTANTIVE DUE PROCESS CLAIM, WHETHER A POLICE OFFICER SHOULD BE HELD LIABLE FOR THE PROSECUTOR'S INDEPENDENT ACT OF FILING A CRIMINAL CHARGE ABSENT ALLEGATIONS THAT THE OFFICER FALSIFIED OR WITHHELD EVIDENCE FROM THE PROSECUTOR.

IV. WHETHER PETITIONER'S FAILURE TO FILE HIS CIVIL RIGHTS CLAIM WITHIN TWO YEARS OF THE FILING OF THE CRIMINAL CHARGE BARRED HIS CLAIM UNDER THE STATUTE OF LIMITATIONS.

V. WHETHER THE DOCTRINE OF QUALIFIED IMMUNITY SHIELDS OFFICER OLIVER FROM DAMAGES LIABILITY.

VI. WHETHER PETITIONER ADEQUATELY ALLEGED A CLAIM FOR MUNICIPAL LIABILITY AGAINST THE CITY OF MACOMB.

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

In March, 1987, Veda Moore approached City of Macomb, Illinois Police Officer Roger Oliver, and other police detectives, seeking protection from a narcotics dealer with whom she had been associated (App. 38a, para. 10).[1] At the time of this request, Moore had just completed a thirty day stay in a narcotics treatment center (App. 39a, para. 11).

Officer Oliver allegedly agreed to provide Moore with protection in return for her services as an informant against drug dealers operating in Macomb (App. 38a-40a, paras. 10-12). Specifically, Moore would first identify drug dealers, and then purchase narcotics from those dealers with funds provided by the Macomb Police Department (App. 39a, para. 12). In addition, Officer Oliver agreed to pay Moore between $50.00 and $75.00 for each transaction she completed (App. 39a, para. 12).

Pursuant to this arrangement, Moore advised Officer Oliver on July 17, 1987, that she had just purchased cocaine from John Albright, Jr., in room 212 of the Pace Hotel in Macomb (App. 40a, para. 13). Moore turned a substance over to the police and it was tested by the Illinois State Police Crime Lab (App. 40a, para. 14). On September 2, 1987, Officer Oliver was advised that the substance was, in fact, baking powder (App. 40a, para. 14).

On September 10, 1987, Officer Oliver related Moore's version of the transaction to a McDonough County Grand Jury, and allegedly testified that John Albright, Jr., was, therefore, guilty of selling a "look-alike" substance (App.

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[1] All citations to "App." refer to Appendix A to Petitioner's Petition for a Writ of Certiorari.

40a, para. 15). As a result of that testimony, the grand jury returned an indictment, and an arrest warrant was thereupon issued for John Albright, Jr., by the Circuit Court of McDonough County (App. 41a, para. 15).

Officer Oliver went to John Albright, Jr.'s home to execute the warrant on September 28, 1987, and discovered that Albright was a 60 year old pharmacist who did not appear to be the person Oliver was seeking (App, 41a, para. 16). At that time, Mrs. Albright told Officer Oliver that the Albrights had two sons, Kevin and John David, and that perhaps Oliver was looking for John David (App. 41a, para. 16; Petitioner's Brief, p. 5).

Later that same day, Officer Oliver scratched John Albright, Jr.'s name from the arrest warrant and inserted the name John David Albright (App. 41a, para. 17). After hearing of the existence of the warrant, John David travelled to Macomb from Chicago, Illinois (App. 42a, para. 18). Upon arrival in Macomb on October 1, 1987, John David met Officer Oliver at the police station and explained that he had been working in Chicago for the previous year, including July 17th, the date on which Ms. Moore claimed to have purchased cocaine at the Pace Hotel (App. 42a, para. 18).

With John David still present, Officer Oliver telephoned Veda Moore, who was by then living in Florida (App. 42a, para. 19). Officer Oliver advised Moore that neither John Albright nor his son John David could have purchased a substance from her on July 17th, and inquired "whether or not it might have been Kevin Albright" (App. 42a-43a, para. 19). Moore confirmed that it was indeed Kevin from whom she had purchased the substance (App. 43a, para. 19).

Two weeks later, on October 16, 1987, Officer Oliver attested to a criminal information charging Petitioner with

the sale of a look-alike substance (App. 43a, para. 20). *See* Ill.Rev.Stat. ch. 56½, para. 1404(b) (1987).[2] Under Illinois law, felonies may be charged either by grand jury indictment or by the state's attorney's filing of an information. Ill.Rev.Stat. ch. 38, paras. 111-2(a) & 111-3(b) (1987). After the information was filed, Officer Oliver changed the arrest warrant, this time to reflect the name "Kevin Albright" (App. 43a-44a, para. 21). Upon learning of the existence of the criminal information and the warrant for his arrest, Petitioner surrendered to Officer Oliver on October 19, 1987, and denied any involvement in the crime (App. 44a, para. 22).

Pursuant to the warrant, Officer Oliver then caused Petitioner to be arrested on bail of $3,500.00 (App. 44a, para. 22). Petitioner posted a $350.00 bond in accordance with Illinois law, and was released pending trial subject to the statutory conditions of his bond (App. 44a, para. 22). One condition was that he could not leave the State of Illinois without leave of court (App. 44a, para. 22). *See* Ill.Rev.Stat. ch. 38, para. 110-10(a)(3) (1987).

At the time, Petitioner was a senior in college and asked his lawyer if he could travel to St. Louis, Missouri for job interviews (App. 45a, para. 23). After his lawyer told him of the cost involved in seeking the court's permission to leave the State, Petitioner chose not to pursue the matter (App. 45a, para. 23).

On January 5, 1988, Officer Oliver testified at a preliminary hearing in *People v. Kevin Albright* (App. 45a-46a,

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[2] The Illinois Revised Statutes were recodified under the designation Illinois Compiled Statutes (ILCS), effective January 1, 1993. Because all events giving rise to Petitioner's complaint occurred well before recodification, Respondents will cite to the 1987 Illinois Revised Statutes throughout this brief.

para. 24). Petitioner alleges that Officer Oliver "recklessly failed to advise the court of the inherently unreliable nature of the information to which he testified"[3] (App. 46a, para. 24). Petitioner further alleges that Officer Oliver recklessly did not advise the court that John Albright, Jr., and John David Albright, were initially accused of the same offense (App. 46a, para. 24; Petitioner's Brief, p. 7). The state circuit court found probable cause and allowed the criminal information to stand (App. 46a, para. 24).

On June 27, 1988, the circuit court dismissed the information on the grounds that it did not state an offense under Illinois law (App. 46a, para. 25). Ultimately, prosecutions which had been instituted against over fifty other individuals on the basis of information provided by Moore were aborted or dismissed (App. 39a-40a, para. 12). The arrest and prosecution of Petitioner was widely reported in the media (App. 46a, para. 26).

Approximately three years after his arrest, and almost two years to the day following the dismissal of the criminal charge, Petitioner filed the instant civil rights lawsuit against Officer Oliver and the City of Macomb pursuant to 42 U.S.C. § 1983 (App. 3a). Petitioner sued the City for funding the investigation and for its delegation of responsibility for the investigation to Officer Oliver and the police department (App. 36a-37a, paras. 3 & 8).

[3] Though Respondents understand the strictures of Fed.R.Civ.P. 12(b)(6), they nonetheless deny Petitioner's allegations of wrongdoing, and respectfully request that any opinion rendered by the Court reflect that denial.

SUMMARY OF THE ARGUMENT

Petitioner posits that the filing of a criminal charge without probable cause deprives the accused of a fundamental liberty which is protected under principles of substantive due process. Though state law vests Illinois prosecutors with the exclusive discretion to file a criminal charge, Petitioner contends that recovery is appropriate under § 1983 against a police officer who contributes to the filing of a charge. Petitioner's theory is problematic in several respects.

Beginning with the text, neither the Constitution nor the Bill of Rights set forth a right to be criminally charged only upon probable cause. The fourth amendment requirement of probable cause applies only to searches and seizures, and would have supported a viable false arrest claim had Petitioner filed his complaint on time. He did not (App. 4a). Therefore, the statute of limitations left Petitioner with no choice but to link his § 1983 claim to the date the charge against him was dismissed, rather than the day he was arrested.

Accomplishing this task under the umbrella of substantive due process encounters several obstacles. Substantive due process is applied in the context of individual rights only to prohibit egregious misconduct which "shocks the conscience" or intrudes upon rights "implicit in the concept of ordered liberty." *See Rochin v. California*, 342 U.S. 165 (1952); *Palko v. Connecticut*, 302 U.S. 319 (1937). It has traditionally been utilized to protect the sanctity of marriage and the family, and the right to bodily integrity. Rarely have principles of substantive due process attached to the criminal justice process, where the fourth, fifth, sixth and eighth amendments provide ample protections to arrestees, criminal defendants, and convicted

criminals. The doctrine has never been applied in that context when the sole purpose of recognizing a fundamental liberty was to give rise to a damages claim under § 1983.

Effectively a damages remedy is all that Petitioner seeks. Indeed, he does not challenge the principle that a criminal defendant is not, absent detention or some other significant restraint on liberty, entitled to a determination of probable cause to prosecute. *See Gerstein v. Pugh*, 420 U.S. 103 (1975); *Lem Woon v. Oregon*, 229 U.S. 586 (1913). Thus cast in its proper light, Petitioner's substantive due process claim focuses on post-deprivation damages rather than a preventative safeguard, and, therefore, is nothing more than a masked procedural due process claim. In that respect, the common law tort of malicious prosecution is an adequate state remedy, and it need not be expanded upon in the form of a § 1983 substantive due process claim. *See Paul v. Davis*, 424 U.S 693 (1976); *Parratt v. Taylor*, 451 U.S. 527 (1981).

The qualitative difference between the intrusion on privacy occasioned by the mere filing of a charge, and an arrest, supports the fourth amendment's restriction of probable cause to the latter. While the formal accusation of crime causes substantial anxiety, stress and perhaps damage to reputation, it does not constitute a tangible restraint on liberty in the way that a search or seizure does. Indeed, the Constitution has never been interpreted to encompass every disruption caused by the government, even when the effects of the intrusion are devastating. *See, e.g., Paul v. Davis*, 424 U.S. 693 (1975).

Even if the Court holds that probable cause is a constitutional prerequisite to the charging decision, a substantive due process claim cannot be sustained simply because a police officer allegedly failed to discern an informant's

obvious unreliability. Yet that is all Petitioner alleges in the instant case. Sanctioning such a claim would permit liability for negligence, in contravention of a long line of precedent restricting substantive due process violations to deliberate or intentional misconduct. *See, e.g., Daniels v. Williams*, 474 U.S. 327 (1986).

Holding police officers civilly responsible for a prosecutor's filing of a criminal charge is also problematic under principles of causation and public policy. Prosecutors, rather than police officers, are charged by statute with the authority to institute criminal prosecutions. To guard against the risk that the charging decision will be skewed by the threat of civil liability, prosecutors enjoy absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409 (1976). Allowing police officers to be held responsible for the prosecutor's filing of charges undermines the purposes of that immunity and encourages police officers to exert substantial influence over the charging decision. For that reason, the courts of appeals agree that police officers should not generally be held liable for the charging decision, unless they falsify or withhold evidence from the prosecutor which taints the integrity of the charging decision. Petitioner makes no such allegation in the instant case.

In the event the Court concludes that Petitioner has stated a viable substantive due process claim, his claim should be barred, nonetheless, by the statute of limitations. A federal civil rights claim accrues on the date the plaintiff first has reason to know of the injury which was caused by the challenged conduct. In this case, Petitioner concedes that "[t]he constitutional violation and the constitutional tort are complete upon the formal filing of the criminal charge without probable cause" (Petitioner's Brief, p. 34). Accordingly, Petitioner's substantive due

process claim accrued on the date the charge was filed against him, rather than when it was dismissed eight months later.

Finally, both Officer Oliver and the City of Macomb enjoy alternative reasons for affirming the court of appeals. Officer Oliver is entitled to qualified immunity from damages liability. Even if Petitioner has sufficiently pled a substantive due process claim, the uncertainty of the constitutional framework for that claim prevents any such right from being deemed clearly established. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

In addition, Petitioner's contention that the City of Macomb improperly funded the narcotics investigation fails to support a claim for municipal liability. The City's liability is dependent upon proof that Petitioner was injured as a result of a municipal custom, practice or policy. *See Monell v. Dept. of Soc. Serv. of City of New York*, 436 U.S. 658 (1978). Permitting a municipal entity to be held liable for merely funding a police operation would be tantamount to imposing liability under a theory of *respondeat superior*, in contravention of this Court's holding in *Monell*.

ARGUMENT

I.

SUBSTANTIVE DUE PROCESS IS NOT INFRINGED WHENEVER A POLICE OFFICER CONTRIBUTES TO THE FILING OF A CRIMINAL CHARGE WITHOUT PROBABLE CAUSE

A. Introduction

Before addressing Petitioner's substantive due process theory, it is useful to identify the constitutional claim which was indisputably available to Petitioner. Officer Oliver's alleged arrest of Petitioner without probable cause set forth a plausible fourth amendment claim based upon an unreasonable seizure (App. 3a). That claim, however, was time-barred (App. 4a).

Accordingly, Respondents do not argue that the Civil Rights Act fails to provide a remedy for the conduct complained of by Petitioner. Rather, the remedy should simply be in the nature of a fourth amendment false arrest claim, as opposed to a substantive due process claim based upon an implied fundamental liberty to be free of a formal accusation of crime without probable cause. *Cf. Graham v. Connor*, 490 U.S. 386 (1989) (excessive force in arrest defined as unreasonable seizure under fourth amendment rather than by generalized notions of substantive due process).

B. General Substantive Due Process Principles

The concept of due process includes both a procedural and a substantive component. *See, e.g., Collins v. City of Harker Heights, Tex.*, 112 S.Ct. 1061, 1068 (1992). Procedural due process requires the government to implement fair procedures when it deprives a person of life, liberty

or property. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). Substantive due process, being something of a misnomer (*see Saukstelis v. City of Chicago*, 932 F.2d 1171, 1173 (7th Cir. 1991)), is less well-defined, but it essentially prevents the government from intruding upon fundamental liberties, regardless of the fairness of any procedures it provides. *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2804-07 (1992). In the instant case, Petitioner concedes the adequacy of Illinois' "procedures for initiating and processing of criminal charges" (Petitioner's Brief, p. 21 n. 9). Accordingly, he rests his case on substantive due process.

The prime examples of fundamental liberties are those which are delineated in the Bill of Rights, and are incorporated against the states through the fourteenth amendment. *See Collins*, 112 S.Ct. at 1068. *See also Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating fourth amendment). Though the concept of substantive due process has occasionally been applied to a small batch of fundamental liberties beyond those set forth in the Bill of Rights (*see Planned Parenthood*, 112 S.Ct. at 2804-05), the undefined boundaries of this unchartered area have led the Court to tread quite cautiously when asked to expand the doctrine. For the most part, its protections have encompassed matters relating to marriage and family, and the right to bodily integrity. *See Planned Parenthood*, 112 S.Ct. at 2805-06 (cataloging cases); *Collins*, 112 S.Ct. at 1068. Furthermore, the role occupied by substantive due process in the context of protecting individual rights has traditionally been limited to those egregious forms of governmental conduct which "shock the conscience" (*Rochin v. California*, 342 U.S. 165 (1952)) or which intrude on rights that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937). These principles of judicial restraint require the Court to carefully

"focus on the allegations in the complaint to determine how petitioner describe[s] the constitutional right at stake" before applying substantive due process protections in a new context. *Collins*, 112 S.Ct. at 1068. *See also Reno v. Flores*, 113 S.Ct. 1439, 1447 (1993).

In this case, Petitioner posits that the filing of a felony charge without probable cause deprives the accused of a fundamental liberty interest which is redressable under 42 U.S.C. § 1983 against a police officer who contributed to the filing of the charge. Petitioner's theory cannot be sustained for three alternative reasons: (1) the concept of probable cause as a prerequisite to the filing of a criminal charge is not, absent incarceration or some other tangible restraint on liberty, a fundamental right protected by substantive due process; (2) the negligent or grossly negligent filing of a criminal charge without probable cause is not sufficiently egregious misconduct to implicate substantive due process; and, (3) based on principles of causation and public policy, a police officer should not be held civilly responsible for a prosecutor's independent act of filing a criminal information in the absence of allegations that the officer falsified or withheld evidence from the prosecutor which tainted the charging decision.

C. The Constitution Does not Require Probable Cause to Accompany the Filing of a Criminal Charge Absent Incarceration or some other Significant Restraint on Liberty

1. The Text of the Constitution Does Not Condition the Filing of a Criminal Charge upon Probable Cause

The starting point for analysis of Petitioner's substantive due process theory must be the text of the Constitution and the Bill of Rights. The phrase "probable cause" is confined to the fourth amendment, which protects against

unreasonable searches and seizures. U.S. CONST. Amend. IV. With respect to the filing of criminal charges, however, the fourth amendment is silent.

The only textual reference to the filing of criminal charges is the fifth amendment's grand jury clause. U.S. CONST. Amend. V. The fifth amendment right to be charged only upon grand jury indictment applies, on its face, to "capital or otherwise infamous crimes," but it is not a fundamental right binding on the states. *See Hurtado v. California*, 110 U.S. 516, 538 (1884).

Petitioner thus recognizes that neither the fourth amendment's probable cause requirement nor the fifth amendment's grand jury clause set forth a constitutional right to be charged only upon probable cause. Instead, Petitioner contends that reading those constitutional provisions in conjunction with our nation's tradition of prosecuting only upon probable cause supports recognition of a fundamental liberty protected by the concept of substantive due process. However, analysis of the fourth and fifth amendments along with the remainder of the Bill of Rights, and the tradition of initiating charges only upon probable cause, warrants adherence to principles of judicial restraint which guide substantive due process jurisprudence.

2. Neither the Fourth Nor Fifth Amendments Support a Due Process Guarantee to be Criminally Charged Only Upon Probable Cause

From a fourth amendment perspective, Petitioner's proposal of a fundamental liberty interest to be charged only upon probable cause, conflicts with the Court's conclusion that the charging decision does not constitute a sufficient deprivation of liberty to require a determination of probable cause. *Gerstein v. Pugh*, 420 U.S. 103, 118-19, & 125 n. 26 (1975). *See also Lem Woon v. Oregon*, 229 U.S. 586

(1913). Only when an accusation of crime causes a significant "restraint on liberty other than the condition that [the accused] . . . appear for trial" does the fourth amendment's prohibition against unreasonable seizures require a determination of probable cause. *Gerstein*, 420 U.S. at 125 n. 26.

This straightforward proposition of law recognizes that it is not the mere accusation of crime, but rather, the state's confrontation and restraint of the person through arrest or detention, which constitutes a seizure within the grasp of the fourth amendment. An arrest interrupts an individual's freedom of movement, interferes with his ability to conduct his daily affairs, and subjects him to the indignities of being fingerprinted, photographed, and otherwise physically processed through the booking procedure. Detention pending disposition of the charges constitutes an even more intrusive physical disruption by depriving the defendant of his home, his family, his ability to earn a living—indeed his freedom.

The filing of a criminal charge, by contrast, "is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined." 4 W. Blackstone, *Commentaries* 300 (1769) (describing an indictment). Such a charge does not, of itself, adjudicate anything, nor does it restrict an individual's movement, his bodily integrity, his freedom to earn a living, his association with family and friends, or his enjoyment of his possessions. Absent incarceration, the accused enjoys a relatively unimpaired existence, although often burdened with some harm to reputation, and with anxiety and stress over the possible disposition of the charges. Thus, the less tangible impact on liberty associated with the filing of charges, in contrast to arrests and detentions, fully supports limiting the reach of the fourth amendment to situations involving the latter. *See Gerstein*, 420 U.S. at 125 n. 26.

Certainly the "wrenching disruption of everyday life" associated with the spector of criminal charges is significant to the accused. *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 814 (1987). The uncertainty of the potential disposition of the charges can be frightening. Nonetheless, neither the person nor his possessions are physically invaded by the filing of charges, and the Constitution has never been interpreted to provide protections against every gut-wrenching intrusion occasioned by the government. *See United States v. Dionisio*, 410 U.S. 1, 10 (1973) (subpoena to testify before grand jury does not implicate fourth amendment); *United States v. Mara*, 410 U.S. 19 (1973) (same).

The right to protect one's good name, for example, "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Indeed, "[a] good name is rather to be chosen than great riches." Prov. 22:1. Nonetheless, the government's defamation of an individual is not a constitutional wrong in the absence of a more tangible deprivation of liberty, typically in the form of a termination of government employment. *Paul v. Davis*, 424 U.S. 693 (1976). Like defamation, the stress, anxiety, and harm to reputation occasioned by the filing of a criminal charge does not constitute a tangible deprivation of liberty which warrants recognition of an implied fundamental right under the substantive component of the due process clause.

In conjunction with the lesser intrusion on liberty caused by the filing of a charge, the wide array of procedural safeguards uniquely available to the criminal defendant further minimizes the need to restrict the state's charging decision under the guise of substantive due process.

Prior to being charged, the fourth amendment provides essentially the sole constitutional buffer between the citizen and arbitrary searches or seizures. The criminal defendant, by contrast, enjoys rights under the sixth amendment to counsel, to compulsory process, to confront witnesses against him, to be notified of the nature of the charges, and to a speedy and fair jury trial. U.S. CONST. Amend. VI. "Every procedural safeguard [contained in the Bill of Rights] made it more difficult for the Government to convict those it accused of crimes." *Green v. United States*, 356 U.S. 165, 216 (1958) (Black, J., dissenting).

These expansive procedural safeguards support the notion that the fourth amendment's silence with respect to the filing of charges was not an oversight. To the contrary, the fourth amendment provides a check against those intrusions on privacy which cannot be undone through the judicial process. The sixth amendment, by contrast, provide the constitutional protections for the unjustly accused.[4]

Nor does the fifth amendment's grand jury clause support Petitioner's theory. The fifth amendment right to a grand jury is the only constitutional provision referencing the charging decision, and it applies to "capital or otherwise infamous crimes." U.S. CONST. Amend. V.[5] The Court, however, has refused to recognize the grand jury as a

[4] The right to trial by jury is found not only in the Bill of Rights, but also in the text of the Constitution. U.S. CONST. Art. III, Sec. 2.

[5] The limitation to "capital or otherwise infamous crimes" was originally interpreted to encompass crimes punishable by loss of life or incarceration with hard labor. *Ex Parte Wilson*, 114 U.S. 417 (1885). Shortly thereafter, the limitation was broadened to include all crimes punishable by imprisonment. *Mackin v. United States*, 117 U.S. 348 (1886).

fundamental right applicable against the states. *Hurtado v. California*, 110 U.S. 516, 538 (1884). Though *Hurtado* relied, in part, on the State of California's substitution of an "examination and commitment by a magistrate" for the role of the grand jury, the Court has repeatedly confirmed that due process is satisfied even when the state authorizes criminal prosecutions to be charged by information without any judicial determination of probable cause. *Lem Woon v. Oregon*, 229 U.S. 586 (1913); *Gerstein*, 420 U.S at 118-19. *See also Beck v. Washington*, 369 U.S. 541, 545 (1961). In such cases, the state's decision to vest the power to formally accuse in a designated representative (i.e., the prosecutor), does not trigger constitutional scrutiny so long as the defendant is not detained or subjected to some other significant restraint on liberty which implicates the fourth amendment's prohibitions against unreasonable seizures. *See Gerstein*, 420 U.S. at 118-119 & 120 n. 26.

Petitioner argues that *Hurtado*, *Lem Woon*, *Beck* and *Gerstein* are inapposite because they concern only a question of procedure, rather than of substance (Petitioner's Brief, pp. 25-26). Those cases, according to Petitioner, only permit the states to forego the procedural determination of probable cause when the defendant is not detained pending resolution of the charge. An underlying substantive right to be charged only upon probable cause thus remains intact under Petitioner's theory.

It is inconsistent, however, for Petitioner to argue that the right to be charged only upon probable cause is so "implicit in the concept of ordered liberty" to be ranked as fundamental, but that it is not fundamental enough to require a procedural safeguard to ensure that probable cause is present. Such a contention is tantamount to saying that the right is fundamental only for purposes of supporting a § 1983 claim for damages. Indeed, Petitioner's contention that the need for a procedural safeguard is irrelevant to the existence of an underlying fundamental substantive right ignores the fact that the very purpose of the fourth amendment is to ensure that the "existence of probable cause be decided by a neutral and detached magistrate whenever possible." *Gerstein*, 420 U.S. at 112-13. *See also Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

Never before has the Court expanded the boundaries of substantive due process for the sole purpose of accommodating a § 1983 damages claim on behalf of an aggrieved individual. To the contrary, the Court's decisions expanding fundamental liberties beyond those contained in the Bill of Rights have been carefully circumscribed to prevent the states (traditionally in the context of family and bodily integrity) from intruding upon important privacy interests deemed essential to ordered liberty. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (prohibition on contraceptives); *Rochin v. California*, 342 U.S. 165 (1952) (stomach pumping to extract evidence); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marriage).

In essence, the fundamental right Petitioner advocates would serve only a remedial, rather than a preventative purpose. The state may prosecute a person without probable cause, Petitioner posits, so long as the Constitution and § 1983 afford a post-deprivation damages remedy. With its focus on post-deprivation damages, rather than pre-deprivation prevention, Petitioner's substantive due process theory is revealed as a disguised procedural due process claim. That being the case, the states' common law tort of malicious prosecution suffices, and a damages remedy need not be provided under § 1983. *See Parratt v. Taylor*, 451 U.S. 527 (1981).

3. Our Nation's Tradition of Conditioning the Filing of a Criminal Charge Upon Probable Cause is not a Fundamental Liberty Protected by Substantive Due Process

Petitioner accurately points out that the "minimal standard in all jurisdictions for the decision to bind a defendant over for a felony is probable cause," and that a prosecutor acts unprofessionally when he recommends that an indictment be returned without probable cause (Petitioner's Brief, p. 16). These facts alone, however, do not warrant the elevation of that practice to the status of a fundamental liberty. The government's defamation of a person, for example, is both unprofessional and illegal in all 50 states. Nonetheless, defamation does not, despite its dire consequences, deprive an individual of a fundamental liberty protected under the due process clause. *Paul v. Davis*, 421 U.S. 693 (1976). *See supra*, p. 14.

Certainly, national tradition is relevant to recognition of a fundamental liberty. *See In re: Winship*, 397 U.S. 358 (1970). However, focusing solely upon the fact of the tradition rather than the underlying justification for its existence risks turning the Constitution into a guarantor of all practices prescribed by the states. This, of course, is not the law. *See Davis v. Scherer*, 468 U.S. 183 (1984). Only by examining the interests protected by the states' practice can it fairly be determined whether that tradition is deserving of constitutional recognition.

From a constitutional perspective, the interest protected by attaching a requirement of probable cause to the filing of criminal charges is the right to be free of incarceration or other significant restraint on liberty. *See Gerstein*, 420 U.S. at 114. Indeed, several states, including Illinois, have recognized that a statutory probable cause requirement is triggered only when the filing of charges serves

as the basis for an arrest warrant. *See, e.g., People v. Harding*, 34 Ill.2d 475, 216 N.E.2d 147 (1966); *State v. Fields*, 119 N.H. 249, 400 A.2d 1175 (1979); *State ex rel. Purcell v. Superior Court*, 109 Ariz. 460, 511 P.2d 642 (1973). When a criminal complaint is filed independently of or after an arrest, its "function is informational," and the privacy interests protected under the Constitution are not implicated. *Fields*, 400 A.2d at 1177. The states' recognition of the Constitution's limited role in relation to statutory probable cause requirements thus undercuts Petitioner's efforts to achieve constitutional recognition of a fundamental liberty to be charged only upon probable cause.[6]

Respondents do not suggest that a requirement of probable cause is an unimportant or an unwise prerequisite to the filing of charges. To the contrary, such a limitation fairly balances the state's interests in fighting crime with the individual's interest in remaining free from the unjust accusation of a crime. Nonetheless, probable cause should be a matter of constitutional magnitude only when the governmental conduct causes a tangible loss of liberty, such as through incarceration, or a search or seizure. In other cases, the states should be left to police their probable cause requirement through their own statutes and common law traditions. Principles of federalism, therefore, encourage deference to the states given the states' uniform recognition of a common law tort claim to re-

[6] As a practical matter, *Gerstein*'s requirement of probable cause for all detained defendants compels the states to apply a standard of probable cause to the filing of all felony charges. Indeed, the state does not know in advance which criminal defendants will make bail, and which will not. Accordingly, recognition of a fundamental liberty to be charged only upon probable cause will not impact in any fashion on the procedural safeguards available to criminal defendants in the various states.

dress the wrongs for which Petitioner seeks a constitutionally based remedy. *See generally*, Annotation, *Malicious Prosecution—Probable Cause*, 14 ALR2d 264 (1950) (reviewing common law malicious prosecution). This view is consistent with this Court's recognition that the fourteenth amendment should not function as a "font of tort law to be superimposed upon whatever systems may already be administered by the states." *See Paul*, 424 U.S. at 701. *See also Baker v. McCollan*, 443 U.S. 137 (1979) (common law tort of false imprisonment not of constitutional magnitude simply because the defendant is a public official).

4. Recognition of a Constitutional Right to be Free From Conviction Except Upon Proof Beyond a Reasonable Doubt Does Not Support Recognition of a Fundamental Right to be Criminally Charged Only Upon Probable Cause

As previously discussed, the Court should examine the interests advanced under a national tradition to determine whether that tradition is deserving of constitutional recognition. In identifying a fundamental right to be free from conviction absent proof beyond a reasonable doubt, the Court has reasoned that the purpose of that standard was to "safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." *In re: Winship*, 397 U.S. 358, 362 (1970), *quoting Brinegar v. United States*, 338 U.S. 160, 174 (1949). Thus, elevation of that common law tradition to constitutional status was "deemed essential for the protection of life and liberty." *Id.* at 362, *citing Davis v. United States*, 160 U.S. 469, 488 (1895). Indeed, the criminal justice system's constitutional safeguards, including the rights to counsel, to a fair jury trial, to confront adverse witnesses, and to compulsory process, would mean little if the jury could convict on a hunch, whim or even a preponderance of the evidence.

The right to be free of an unjust criminal accusation, by contrast, has never been viewed on a plane with the right to avoid unjust conviction. As noted above (*see supra*, pp. 13-15), the mere filing of charges simply constitutes a qualitatively less intrusive interference with privacy interests than does conviction of a crime. Indeed, a primary focus of the Bill of Rights was to protect the unjustly accused from the risk of an unjust conviction. *See, e.g., Green v. United States*, 356 U.S. 165, 216 (1958) (Black J., dissenting). The Bill of Rights was not crafted, however, to provide the same level of protections against being accused in the first instance.

The chasm between the interests protected in *Winship* and those implicated by the filing of a criminal charge is perhaps best illustrated by *Gerstein*'s recognition that the charging decision is not reviewable. *Gerstein*, 420 U.S. at 118-19. It would be unthinkable, by contrast, to suggest that, while the states must condition criminal convictions on the presence of proof beyond a reasonable doubt, that they need not provide the safeguard of a jury trial to ensure that the standard is satisfied. If safeguarded only by the availability of a post-conviction damages remedy, the right to be free from conviction except upon proof beyond a reasonable doubt would be an illusory entitlement indeed. Similarly, if Petitioner's purported right to be charged only upon probable cause was truly worthy of constitutional recognition, then *a fortiori*, it would be deserving of a procedural safeguard, rather than only a § 1983 post-deprivation damages remedy.

Petitioner's related contention that "prosecution without probable cause unreasonably puts an accused at risk of wrongful conviction" is similarly untenable (*See* Petitioner's Brief, p. 19). That argument also ignores the fact that the Bill of Rights is replete with safeguards designed

to ensure that the unjustly accused is not unjustly convicted. The difference between the standards of probable cause and proof beyond a reasonable doubt is so great that it is unreasonable to presume that a person prosecuted without probable cause risks conviction under the more stringent standard in the absence of affirmative efforts to corrupt the trial process.

The Constitution has been interpreted, of course, to protect the accused from efforts to corrupt the truth-seeking process of the criminal justice system. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963) (duty to disclose exculpatory evidence); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (bad faith failure to preserve evidence violates due process). Indeed, the trial process was created to prevent unjust convictions. The charging process, by contrast, serves more as an initial screening device than as a protection against the risk of unjust conviction. *See United States v. Williams*, 112 S.Ct 1735 (1992) (describing role of grand jury). Therefore, the accused has no constitutional right to be criminally charged only upon probable cause absent incarceration or some other tangible restraint on liberty.

D. Assuming Probable Cause is a Constitutional Prerequisite to the Filing of a Criminal Charge, The Due Process Clause is not Implicated by Negligent Governmental Conduct

Principles of due process are intended to "secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986), *quoting Hurtado v. California*, 110 U.S. 516, 527 (1884). For that reason, the concept has traditionally been applied only to redress "deliberate decisions of governmental officials to deprive a person of life, liberty, or property." *Daniels*, 474 U.S. at 332. Mere negligence is never enough. *Id.* Petitioner must show that a public official "en-

gag[ed] in conduct that 'shocks the conscience' . . . or interfered with rights 'implicit in the concept of ordered liberty.' " *United States v. Salerno*, 481 U.S. 739, 746 (1987), *quoting Rochin v. California*, 342 U.S. 165, 172 (1952) and *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1952).

Disregarding these limiting principles, Petitioner insists that substantive due process is violated every time a prosecution occurs without probable cause, regardless of the level of culpability attributable to the officer (Petitioner's Brief, pp. 21-22). Simply permitting liability for a prosecution which occurs without probable cause, however, is tantamount to permitting liability for mere negligence. Indeed, "a want of probable cause . . . involves unreasonable conduct under the circumstances and in that respect bears some resemblance to the idea of negligence." *Prosser on Torts*, § 119 at 876. Probable cause constitutes an inquiry into whether "the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed." *Carroll v. United States*, 267 U.S. 132, 161 (1925). While that standard may suffice under a fourth amendment analysis, it is insufficient to trigger principles of substantive due process.

Petitioner suggests that police officers will not be liable for mere negligence under his proposed standard because the doctrine of qualified immunity limits an officer's liability to objectively unreasonable failures to discover probable cause (Petitioner's Brief, pp. 36-37). This ostensible concession misses the mark for two reasons. First, a determination of probable cause is itself based upon the objective reasonableness of the officer's perceptions. *Prosser*, at § 119, p. 876. Objective unreasonableness is thus virtually equated with an absence of probable cause, and both sound in negligence.

Second, qualified immunity is an affirmative defense based on common law practices and, to a lesser extent, public policy concerns, but it is not constitutionally grounded. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The officer's qualified immunity is, therefore, irrelevant to the validity of the fundamental liberty Petitioner advocates. Petitioner's proposed right to be free from being charged without probable cause must, therefore, survive or fall of its own merits. A public official's qualified immunity cannot be relied upon by Petitioner as a means of watering down the explosive impact his proposed standard would have on liability.

Acceptance of Petitioner's theory would have the perverse effect of expanding the scope of liability for the unfounded filing of charges far beyond that which is currently contemplated at the common law and under federal cases which recognize a § 1983 claim for the malicious filing of charges without probable cause.[7] The common law

[7] The courts of appeals are divided on the issue whether a malicious prosecution gives rises to a § 1983 claim. *See Brummett v. Campbell*, 946 F.2d 1178, 1180-81 n. 2 (5th Cir. 1991) (cataloging cases), *cert. denied*, 112 S.Ct 2323 (1992). Some courts permit § 1983 challenges to the initiation of charges only when an independent constitutional guarantee, such as the right to equal protection is impinged. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561-62 (9th Cir. 1987) (intent to discriminate); *Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990); *Easton v. Sundram*, 947 F.2d 1011, 1017-18 (2d Cir. 1991) (no § 1983 claim where plaintiff not physically abused, detained or discriminated against), *cert. denied*, 112 S.Ct. 1943 (1992); *Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404, 410 (1st Cir. 1990). Even those courts which recognize a § 1983 claim for prosecution without probable cause insist upon a showing of malice or its equivalent. *See Goodwin v. Metts*, 885 F.2d 157, 160 n. 1 and 163 (4th Cir. 1989) (failure to disclose exculpatory evidence), *cert. denied, sub nom Maxwell v. Goodwin*, 494 U.S 1081 (1990); *Strength v. Hubert*, 884 F.2d 421, 425-26 (11th Cir. 1988) (capricious prosecution procured by false and misleading evidence); *Wheeler v. Cosden Oil Chemical Co.*, 734 F.2d 254, 260 (5th Cir. 1984) (malicious tendering of false information) *Rose v. Bartle*, 871 F.2d 331, 348-49 (3d Cir. 1989) (malice or other improper purpose).

tort of malicious prosecution is triggered only when malice motivates the filing of charges without probable cause. RESTATEMENT (SECOND) OF TORTS, § 653(a) (proceedings initiated "primarily for a purpose other than that of bringing an offender to justice"). Petitioner's proposed standard, however, would entirely dispense with any requirement of malice or improper purpose, and would permit federal § 1983 claims to be stated in all criminal proceedings which do not result in a conviction.[8] As the amici National League of Cities, et al., points out, approximately one-quarter of all criminal prosecutions in the United States result in either dismissal, acquittal or *nolle prosequi* (Amici Brief, p. 12 & n. 2). If Petitioner's standard is accepted, all such individuals (over 150,000 based on 1988 figures) would be able to ride the shuttle from the state court upon dismissal of their criminal charges to the federal courthouse to sue police officers for mere negligence in failing to ascertain the absence of probable cause. Certainly principles of substantive due process do not warrant an expansion of liability beyond that already existing at common law in order to encompass merely negligent conduct.

E. Assuming Probable Cause is a Constitutional Prerequisite to the Filing of a Criminal Charge, Petitioner Has Not Identified An Egregious Abuse of Power Sufficient to Implicate Substantive Due Process

Petitioner's proposal of a standard of objective unreasonableness was unavoidable from his perspective. Officer

[8] Even a finding of probable cause in the criminal proceeding would not likely be entitled to preclusive effect in a subsequent civil case because an acquitted defendant has no opportunity for review of the finding of probable cause in the criminal case. *See, e.g., People v. Mordican*, 64 Ill.2d 257, 356 N.E.2d 71 (1976); *Stevenson v. City of Chicago*, 638 F.Supp. 136 (N.D.Ill. 1986).

Oliver's alleged pursuit of a criminal charge against Petitioner without discerning Veda Moore's unreliability cannot realistically be characterized in more culpable terms. To establish a violation of substantive due process in an individual liberties case, however, a pleader must establish an "affirmative abuse of power" through facts supportive of an inference of egregious misconduct or of conduct that "shocks the conscience." *See Rochin v. California*, 342 U.S. 165 (1952); *Daniels v. Williams*, 474 U.S. 327, 330 (1986). Such a standard might be satisfied through factual allegations of intentional misconduct, or perhaps even recklessness, when that term is utilized as a proxy for intent. *See Archie v. City of Racine*, 847 F.2d 1211, 1219-20 (7th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1065 (1989). Absent deliberate or intentional misconduct, however, the limited protections of substantive due process are simply not implicated. *See Daniels v. Williams*, 474 U.S. at 331; *Davidson v. Cannon*, 474 U.S. 344, 348 (1986).

Notwithstanding Petitioner's conclusory characterization of Officer Oliver's conduct as reckless, the facts alleged only support an inference of negligence. Petitioner does not claim that Officer Oliver singled him out for his membership in a particular class, or in retaliation for Petitioner's exercise of constitutionally protected rights, or out of malice or for any other improper purpose. Essentially, Petitioner simply alleges that Officer Oliver failed to discover that Ms. Moore was providing bad information.

Petitioner suggests that Moore's unreliability was obvious because (1) she was a drug addict who had just been released from a cocaine treatment center; (2) the substance she turned over to Officer Oliver turned out to be baking powder; and, (3) the person Moore initially identified—John Albright, Jr.—did not fit the bill of a drug dealer (*See* Petitioner's Brief, pp. 3-7).

The facts alleged by Petitioner to show Moore's obvious unreliability are subject to widely varying inferences. Initially, Moore's status as a drug addict is insufficient to indicate that she lacked credibility. The very nature of ferreting out crime necessitates the use of informants who are usually part of the criminal world themselves, or at least have earned the confidence of criminals. *See* W. LaFayve, *Search and Seizure, A Treatise on the Fourth Amendment*, Vol. I, § 3.3, p. 611 (1987). The typical narcotics informant has been described as "a guy who made a purchase a half hour ago," got caught and traded information for a deal. Rebel, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 Yale L.J. 703, 712-13 (1972).

Similarly, the fact that the substance turned in by Moore turned out to be baking powder, and that John Albright, Jr., did not resemble a drug dealer, do not raise the level of Oliver's culpability beyond mere negligence. That information might have led some police officers to conclude that the informant was leading them down a primrose path. It would be just as reasonable, however, for another officer to conclude that it was the informant who was being duped by an unscrupulous drug dealer with respect to the nature of the substance she purchased. Indeed, the frequency with which such activity occurs explains why Illinois criminalized the sale of a "look-alike substance." *See* Ill.Rev.Stat. ch. 56½, para. 1404(b) (1987). Moreover, the discrepancy in the alleged seller's identity could just as easily have been attributable to a misunderstanding as to an indication of Moore's lack of credibility.

Petitioner also contends that Officer Oliver acted recklessly because he failed to corroborate Moore's information through surveillance, marked bills or eavesdropping devices (App. 46a-47a, para. 27; Petitioner's Brief, p. 7). Once again, Oliver's

failure to utilize the corroborative techniques suggested by Petitioner can only be described as negligent. Indeed, under the circumstances, his decision appears reasonable.

Marked money, for instance, is typically effective only in a "buy-bust" transaction, where the culprit is apprehended in possession of the marked bills on the heels of the transaction. The ploy is of no use, however, in a wide-ranging grand jury investigation in which dozens of suspects are implicated by the work of a single informant or group of informants. In such cases, the investigation's secrecy is dependent upon delaying the arrests until the entire investigation is complete, rather than at the time of each individual transaction. Clearly, marked money was not a viable option.

Similarly, surveillance was not an option because the transaction allegedly occurred inside a hotel room. Elaborate video surveillance, such as that which occurs in high level F.B.I. operations is not generally feasible in small town investigations lacking the resources to utilize such measures.

Eavesdropping devices run a serious risk of detection, and consequent danger to the informant wearing such a device. A law enforcement official's refusal to use such devices is well within his discretion, and can hardly be characterized in any more culpable terms than negligence given the substantial risk involved.

The bottom line is that a case describing a flawed investigation can be made out in most criminal prosecutions which do not end in conviction. Informants can always be described as unreliable. But unless the federal courts are to sit in judgment of the adequacy of all police investigations, § 1983 challenges to the filing of charges must be limited (assuming they are cognizable at all in the absence

of detention or discrimination) to those instances where a criminal prosecution is instituted out of malice or at least with some form of actual knowledge of the defendant's innocence of the charged offense.

Indeed, the widely varying inferences which can be drawn in a credibility dispute counsel against a constitutional standard requiring such determinations in connection with the mere filing of a charge. It is one thing to require the state to make a preliminary assessment of credibility as a prerequisite to an arrest or detention. The individual's fundamental interest in avoiding an unreasonable invasion of privacy justifies burdening the government with the obligation to make a preliminary credibility determination before it conducts searches or seizures. *See Illinois v. Gates*, 462 U.S. 213 (1983).

Such a requirement, however, has never been imposed in connection with the mere filing of a criminal charge. Though Petitioner contends that the fifth amendment's grand jury clause obligates the government to weigh credibility in connection with the filing of a criminal charge (Petitioner's Brief, pp. 22-26), not even the grand jury is duty-bound to make credibility determinations in order to ensure that individuals are charged only upon reliable evidence. As the Amici National League of Cities, et al., points out, the grand jury has never been "hampered by rigid procedural or evidential rules, but instead, '[w]as free to make [its] presentments or indictments on such information as [it] deem[ed] satisfactory' " (Amici Brief, p. 19, *citing Costello v. United States*, 350 U.S. 359, 362 (1956)). Grand jury proceedings are non-adversarial in nature, and the defendant has no right to present evidence, to confront witnesses or even to appear. Alexander and Portman, *Grand Jury Indictment versus Prosecution by Information—An Equal Protection-Due Process Issue*, 25 Hast.L.J. 997, 1005-06 (1974).

Moreover, facially valid indictments returned by a duly constituted grand jury are not subject to dismissal even if exculpatory evidence is withheld from the grand jury. *United States v. Williams*, 112 S.Ct. 1735 (1992). Exculpatory evidence may be withheld because the grand jury need only assess the state's case, and credibility determinations and the like are left for the crucible of the trial process and cross examination. *See Williams*, 112 S.Ct. at 1745-46. *See also United States v. Calandra*, 414 U.S. 338 (1974) (exclusionary rule inapplicable to grand jury).

Viewed against that backdrop, the wide latitude traditionally afforded the grand jury is inconsistent with Petitioner's efforts to saddle the government with a constitutional obligation to make objectively reasonable credibility determinations before it can charge a crime based on an informant's information. Rather, limiting the government's obligation to assess credibility to the trial process and to situations where it conducts searches and seizures is thus consistent with the fourth, fifth and sixth amendments, and with this Court's interpretations of due process. Accordingly, Officer Oliver's alleged inability to discern Moore's unreliability is not the type of egregious misconduct which is required of a valid substantive due process claim.

II.

POLICE OFFICERS SHOULD NOT BE HELD RESPONSIBLE FOR A PROSECUTOR'S INDEPENDENT ACT OF FILING A CRIMINAL INFORMATION ABSENT A CLAIM THAT THE OFFICER CORRUPTED THE PROSECUTOR'S DECISIONMAKING PROCESS

Under Illinois law, the state's attorney for a particular county "is vested with exclusive discretion in the initiation and management of a criminal prosecution. *People*

ex rel. Daley v. Moran, 94 Ill.2d 41, 445 N.E.2d 270, 272 (1983). *See also* Ill.Rev.Stat. ch. 14, para. 5; ch. 38, para. 111-3(b) (state's attorney must sign the information). The decision to bring formal criminal charges against an accused is a uniquely prosecutorial act which lies at the core of the prosecutorial function. *Imbler v. Pachtman*, 424 U.S. 409 (1976). Nonetheless, Petitioner does not sue the prosecutor who filed the charge against him,[9] but rather, he sues the police officer who arrested him. While Petitioner's complaint sets forth a plausible false arrest claim against Officer Oliver, that claim was barred by the statute of limitations (*see* App. 4a). Having lost his false arrest claim against Officer Oliver to the statute of limitations, and his malicious prosecution claim against the prosecutor to the doctrine of absolute immunity, Petitioner seeks to hold Officer Oliver liable for the prosecutor's act of filing the felony charge. This Court should not countenance such a claim, absent allegations that the officer intentionally or fraudulently corrupted the prosecutor's decisionmaking process.

This Court's decisions on prosecutorial immunity are intended to insulate the charging decision from the threat of civil liability. *See, e.g., Burns v. Reed*, 111 S.Ct. 1934, 1938-39 (1991). Those decisions are not intended, however, to expand the liability of the police by saddling them with civil rights exposure which would, absent immunity, be borne by the prosecutors. Recognition of a general rule of police liability for causing criminal charges to be filed would undermine the operation of the criminal justice process. If generally faced with civil responsibility for the prosecutor's filing of charges, police officers will be hard-pressed to leave

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[9] This was a wise decision given the doctrine of prosecutorial immunity. *See Imbler v. Pachtman*, 424 U.S. 409 (1976).

the charging decision to the discretion of the official to whom that task is statutorily deferred. As a result, police officers will be encouraged to pressure prosecutors to charge only those cases in which a conviction is virtually assured, thus undercutting the very purpose of prosecutorial immunity.

In addition, those police officers who doubt their ability to influence the prosecutor in his charging decision will be encouraged to withhold presentation of all but the most compelling cases in the first instance. This not only interferes with the charging decision, but, even more importantly, it would reallocate the charging decision in a large number of cases to the police officer's discretion. Granted, police officers are vested with an initial level of discretion in determining which cases should be presented to the prosecutor; nonetheless, if faced with liability for the prosecutor's act of filing criminal charges, that discretion will more likely be exercised in favor of non-presentment because of the threat of civil liability rather than based on the insufficiency of the evidence.

In recognition of this division of responsibility, the federal courts of appeals have uniformly held that police officers should not be held liable for a prosecutor's decision to prosecute unless the plaintiff alleges that the officer tainted the prosecutor's decisionmaking process through submitting false information or withholding relevant evidence.[10] This rebuttable presumption in favor of police

[10] *See, Robinson v. Maruffi*, 895 F.2d 649, 655-56 (10th Cir. 1990); *Barts v. Joyner*, 865 F.2d 1187, 1195-97 (11th Cir.), *cert. denied*, 493 U.S. 831 (1989); *Jones v. City of Chicago*, 865 F.2d 985, 993-94 (7th Cir. 1988); *Smiddy v. Varney*, 665 F.2d 261, 266-67 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982); *Ames v. United States*, 600 F.2d 183 (8th Cir. 1979); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). *But see Smith v. Gonzalez*, 670 F.2d 522 (5th Cir.) (indictment is absolute bar to claim against police officer), *cert. denied*, 459 U.S. 1005 (1982).

officers is consistent with common law tort principles which are incorporated into § 1983 analysis. *See Monroe v. Pape*, 356 U.S. 167 (1961).

Viewed against that backdrop, Petitioner has not alleged facts sufficient to hold Officer Oliver liable for the state's attorney's decision to charge Petitioner with sale of a look-alike substance. Petitioner makes no allegation that Officer Oliver withheld information from the prosecutor, fabricated evidence, or engaged in any other conduct which prevented the prosecutor from making a fully informed decision to go forward. So long as the prosecutor possessed all of the relevant information bearing on the decision to file charges (and there is no allegation that he did not), Officer Oliver should not be held civilly responsible for the prosecutor's decision to prosecute.

Petitioner also implies that Officer Oliver disrupted the criminal process by withholding relevant information from the court during the preliminary hearing on probable cause two and one-half months after Petitioner was charged (*see* Petitioner's Brief, p. 7). Once again, however, Petitioner has not alleged that Officer Oliver withheld relevant information from the prosecutor. If the prosecutor sought to elicit information from Oliver with respect to the initial involvement of John Albright, Jr., and John David Albright, he could have asked Oliver questions along those lines. Absent an allegation that Officer Oliver either testified falsely or failed to apprise the prosecutor of relevant information, he should not be held responsible for the prosecutor's failure to delve into certain areas deemed relevant by Petitioner.[11]

[11] Alternatively, the doctrine of absolute immunity protects police officers and other witnesses from liability for allegedly giving per-

(Footnote continued on following page)

III.

ASSUMING PLAINTIFF HAS ADEQUATELY PLED A SUBSTANTIVE DUE PROCESS CLAIM, SUCH CLAIM IS TIME-BARRED UNDER THE STATUTE OF LIMITATION

The statute of limitations for civil rights claims asserted in federal courts situated in the State of Illinois is two years. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Anton v. Lephamer*, 787 F.2d 1141 (7th Cir. 1986). Because Petitioner's federal lawsuit was not filed until June 26, 1990, all claims arising from his arrest in October, 1987, were time-barred (*See* App. 4a). The criminal charge, however, was not dismissed until June 27, 1988. The district court concluded, therefore, that the statute of limitations did not bar Petitioner's § 1983 civil rights claim for malicious prosecution because such claims "accru[e] when the prosecution terminates in favor of the defendant" (App. 17a).[12]

Petitioner's substantive due process claim should have accrued when the charge was placed against him in October, 1987, rather than when it was dismissed in late June, 1988. The accrual date for federal causes of action is determined by reference to federal law. *See 2 Moore's Federal Practice*, § 2.08(2) n. 25. A federal civil rights claim accrues on the date the plaintiff first has reason to know of the injury which

[11] *continued*
jured testimony at a criminal trial or at a probable cause hearing. *Burns v. Reed*, 111 S.Ct. 1934, 1940-42 (1991); *Briscoe v. LaHue*, 460 U.S. 325 (1982). In this case, Officer Oliver is not even alleged to have testified falsely, but rather, he is simply accused of failing to advise the court that he initially believed that John Albright, Jr., rather than Kevin Albright, was the culprit. Any civil claims challenging that omission are, therefore, well within the umbrella of absolute immunity.

[12] The court of appeals found it unnecessary to address the statute of limitations issue (App. 12a)

was caused by a constitutional deprivation. *See e.g., Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981); *Bireline v. Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979). In this case petitioner actually concedes that "[t]he constitutional violation and the constitutional tort [are] complete upon the formal filing of the criminal charge without probable cause (Petitioner's Brief, p. 34). *See also Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

The district court's reliance on the date the charge was dismissed in June, 1988, was premised on the fact that common law claims for malicious prosecution accrue when the prosecution terminates. *See also Rose v. Bartle*, 871 F.2d 331, 348-49 (3d Cir. 1989); *Robinson v. Maruffi*, 895 F.2d 649, 654-55 (10th Cir. 1990). Respondents dispute the validity of this approach in the context of a constitutionally based claim. While the circumstances surrounding the initiation of criminal charges may, under some circumstances, cause a deprivation of liberty without due process, this should not lead to the federalizing of the common law tort of malicious prosecution. As one commentator has suggested, "tort-laden terminology . . . only serves to obscure meaningful constitutional analysis." S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of § 1983*, § 3.15, p. 214. Therefore, "it is inappropriate to speak of § 1983 malicious prosecution." *Id.*

The rationale underlying Professor Nahmod's suggestion is persuasive. The mere fact that a pleader can establish a federal civil rights claim arising from a state court prosecution should not lead to the federalizing of a common law tort containing other elements which are irrelevant to the deprivation of the constitutional right. For instance, the common law's requirement of favorable termination of criminal charges as an element of a malicious prosecu-

tion claim is not essential to the success of a federal constitutional challenge to a particular prosecution. Even a convicted defendant may pursue a civil rights claim against those who caused his prosecution. *See King v. Goldsmith*, 897 F.2d 885 (7th Cir. 1990); *Smith v. Springer*, 859 F.2d 31, 33-35 (7th Cir. 1988). If favorable termination is not an essential element of a civil rights challenge to the decision to prosecute, then it makes little sense to set the accrual date for such claims on the day the prosecution is terminated.

Common law malicious prosection claims and civil rights challenges to certain aspects of criminal prosecutions are mutually exclusive concepts which need not be interwoven or superimposed upon each other for any purpose, including the statute of limitations. If the filing of the charge against Petitioner in October, 1987, deprived him of a liberty interest without due process, his cause of action accrued at that time, rather than eight months later when the charge was dismissed. The statute of limitations thus provides an alternative basis for affirming the decision of the court of appeals.

IV.

OFFICER OLIVER IS ENTITLED TO QUALIFIED IMMUNITY FROM DAMAGES LIABILITY[13]

Pursuant to principles of qualified immunity, public officials may not be subjected to suit under the Civil Rights Act unless "their conduct violat[ed] clearly established statutory or constitutional rights of which a reasonable person would

[13] The district court agreed that qualified immunity provided an alternative basis for the dismissal of Petitioner's § 1983 claim (App. 24a). The court of appeals found it unnecessary to address the question (App. 12a).

have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). This test necessitates a fact-specific, particularized focus to resolving immunity claims. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Hunter v. Bryant*, 112 S.Ct. 534 (1991).

Even if this Court should conclude that Petitioner has sufficiently pled a substantive due process claim in connection with his prosecution for sale of a controlled substance, the uncertainty of the constitutional framework for such claims, as evidenced by the preceding discussion, prevents any such right from being deemed clearly established. Indeed, Justice White has specifically noted that there is "clear disagreement among the Courts of Appeals" on whether malicious prosecution gives rise to a cause of action under § 1983. *Campbell v. Brummett*, 112 S.Ct. 2323 (1992) (White, J., dissenting from denial of writ of certiorari). Similarly, the lower court observed that this is a question on which there is an embarrassing diversity of judicial opinion (App 5a). *See also Kompare v. Stein*, 801 F.2d 883, 891 n. 9 (7th Cir. 1986) ("whether or not the right to be free from prosecution without probable cause exists, it does not appear to be clearly established"); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988) (open and difficult question whether a criminal defendant who is free on bond during the pendency of criminal charges may pursue a constitutionally based malicious prosecution claim on the basis of a deprivation of liberty). Accordingly, the law has not yet recognized a clearly established constitutional right to be prosecuted only upon an objectively reasonable belief in the presence of probable cause. Qualified immunity thus provides an alternative basis for affirming the court of appeals' decision in favor of Officer Oliver.

V.

PETITIONER'S FAILURE TO SUFFICIENTLY ALLEGE A MUNICIPAL CUSTOM, PRACTICE OR POLICY PROVIDES AN ALTERNATIVE BASIS FOR AFFIRMING THE DISMISSAL OF HIS CLAIMS AGAINST THE CITY OF MACOMB[14]

In order to state a civil rights claim against either a municipality or a public official in his official capacity, a pleader must show that his injury was caused by a municipal custom, practice or policy. *Monell v. Dept. of Soc. Services of City of New York*, 436 U.S. 658 (1978); *Kentucky v. Graham*, 473 U.S. 159 (1985). Because police misconduct claims generally involve actions undertaken by lower level, non-policymaking public employees, allegations based upon a single incident of such misconduct are generally insufficient to give rise to a municipal custom or policy. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). *Cf. Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (single incident may suffice where conduct undertaken by policymaker).

In this case, Petitioner's policy allegations against the City of Macomb stem from its alleged delegation of responsibility for enforcing the narcotics laws to the detective division of its police department (App. 36a, para. 3). Petitioner also targets the City's decision to provide Oliver with funds to use for the purchase of controlled substances (App. 37a, para. 8).

It stretches the imagination to claim that the provision of funding was an improper policy which caused Petitioner's injuries. Petitioner was allegedly prosecuted because of Officer Oliver's failure to discover Veda Moore's unreliability as an informant, a theory which bears no relation to the City's decision to fund the undercover drug operation. The mere fact that a municipality funds a police operation should not render it liable for every alleged flaw in the operation itself. If Petitioner's funding theory were accepted, every police shooting would support a *Monell* claim through an allegation that the City provided funding for purchase of the weapon, regardless of whether the officer was properly trained to use the weapon. Such a result would run counter to *Monell*'s admonition against *respondeat superior* liability. *See Monell*, 436 U.S. at 691.

The Mayor's alleged delegation of the narcotics investigation to Officer Oliver is similarly deficient. Municipalities always delegate control of police operations to the police department. Petitioner has not alleged that the City authorized Officer Oliver to employ unreliable, paid informants, but rather, he has claimed only that the City delegated to Oliver the leeway to conduct a police operation in the manner Oliver felt proper. If Petitioner is correct in his contention that Oliver utilized an unreliable informant, that transgression is in no sense attributable to the City, which is not alleged to have had any responsibility for Moore's employment. *See* M. Schwartz & J. Kirklin, § *1983 Litigation: Claims, Defenses and Fees*, § 3.10, p. 169 (2nd Ed. 1991) ("highly unlikely" that malicious prosecution could support claim for municipal liability).

In essence, Petitioner brought suit based upon a single act of police misconduct and tacked on conclusory allegations of a custom, practice or policy in an attempt to hold the City of Macomb responsible. Although Petitioner need not satisfy a heightened pleading requirement (*Leatherman v. Tarrant County Narcotics Intelligence and Coor-*

[14] The district court agreed that Petitioner's official policy claim was insufficient to survive the pleadings (App. 25a). The court of appeals found it unnecessary to address the issue (App. 12a).

dination Unit, 113 S.Ct. 1160 (1993)), he still must allege specific facts to support his claim of municipal liability. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). Accordingly, Petitioner's failure to adequately allege a custom, practice or policy which contributed to his injury provides an alternative basis for affirming the court of appeals' decision in favor of the City of Macomb.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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